85-2154

Supreme Court, U.S.
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No. [redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE ARMSTRONG RUBBER COMPANY and
COOPER TIRE & RUBBER COMPANY,
Petitioners,

v.

THE UNITED STATES, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether a United States Court of Appeals may exercise jurisdiction over an appeal where the only notice of appeal was filed before the trial court disposed of a post-judgment motion which was served within 10 days after entry of judgment and which sought alteration of the judgment to correct a matter other than a purely clerical error in the judgment.

2. Whether a motion for alteration of judgment which is served within 10 days after entry of judgment and which, if granted, would convert the judgment on the merits from a final and appealable order into an interlocutory order is "collateral" to the decision on the merits and therefore does not nullify a notice of appeal filed prior to disposition of the post-judgment motion.

LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Federal Circuit were The Armstrong Rubber Company, Cooper Tire & Rubber Company, The B.F. Goodrich Company, the United States, and various "Korean interests," as follows: Hankook Tire Mfg. Co., Ltd., Hankook Tire America Corp., Kumho & Co., Inc., Kumho U.S.A., Inc., Hyosung Corp., and Hyosung America, Inc.

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COOPER TIRE & RUBBER COMPANY,
Petitioners,

v.

THE UNITED STATES, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners, The Armstrong Rubber Company and Cooper Tire & Rubber Company, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit ("CAFC") entered herein on April 7, 1986.[1]

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[1] Neither petitioner has any parent companies, subsidiaries (other than wholly owned subsidiaries) or affiliates, except that The Armstrong Rubber Company and another company, Echlin, Inc., each owns 50 percent of Double Wharf Corporation.

In addition to the United States, the respondents include each of the Korean interests listed at ii, *supra*. The Korean interests were intervenors-defendants at the United States Court of International Trade ("CIT"); at the CAFC, they were permitted to appear in support of the United States, appellant.

OPINIONS BELOW

The order of the CAFC (App. A, *infra*, 1a-2a), which was not accompanied by an opinion, is not reported. That order remanded the appeal to the CIT with directions to reconsider its judgment entered on August 8, 1985 (App. B, *infra*, 3a). The CIT's opinion of August 8, 1985, is reported at 614 F. Supp. 1252 (1985) (App. C, *infra*, 4a-7a).

Before entering its order of April 7, 1986, the CAFC issued an order, on January 31, 1986, denying petitioners' motion to dismiss the appeal for lack of jurisdiction (App. D, *infra*, 8a-9a). That order is not reported.

JURISDICTION

The judgment of the CAFC was entered on April 7, 1986, and this petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

The relevant provisions of the Federal Rules of Appellate Procedure ("Fed. R. App. P.") and other court rules are set forth in the appendix (App. E, *infra*, 10a-18a).

STATEMENT OF THE CASE

Introduction

Fed. R. App. P. 4(a)(4) continues to bedevil the courts of appeals.[2] There has been a plethora of ju-

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[2] Since 1979, the rule has provided, *inter alia*, that, if a timely

dicial opinion and commentary discussing the rule and dealing with the insufferable dispute over whether a post-judgment motion should be characterized as brought under Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 59(e), to which Fed. R. App. P. 4(a)(4) refers, or Fed. R. Civ. P. 60, as to which Fed. R. App. P. 4(a)(4) is silent. *See Venen v. Sweet*, 758 F.2d 117, 122-23 (3d Cir. 1985); *United States v. 1982 Sanger 24' Spectra Boat*, 738 F.2d 1043, 1045-46, 1047-49 (dissenting opinion) (9th Cir. 1984); *Western Industries, Inc. v. Newcor Canada Ltd.*, 709 F.2d 16 (7th Cir. 1983) (per curiam); *St. Paul Fire & Marine Insurance Co. v. Continental Casualty Co.*, 684 F.2d 691 (10th Cir. 1982); *Lapeyrouse v. Texaco, Inc.*, 670 F.2d 503, 505 (5th Cir. 1982); Sacks, *The Proper Time to File a Notice of Appeal*, 1 Fed. Litigator 23 (1985) (App. F, *infra*, 19a-21a).

On facts materially indistinguishable from those involved herein, the United States Court of Appeals for

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motion is filed to alter or amend the judgment, "the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above." Fed. R. App. P. 4(a)(4) (*see* App. E, *infra*, at 10a).

The rule unquestionably applies to appeals from the CIT to the CAFC. *See* Rules of The United States Court of Appeals For the Federal Circuit Supplementing The Federal Rules of Appellate Procedure, Introduction: "Appeals shall be governed by the Federal Rules of Appellate Procedure (FRAP), with such modifications and additions as are dictated by the nature of the court's jurisdiction. Provisions of FRAP applicable to a 'District Court' shall apply to the United States Court of International Trade and the United States Claims Court." App. E, *infra*, at 11a.

the Fifth Circuit, sitting *en banc*, recently has dismissed appeals for lack of jurisdiction under Fed. R. App. P. 4(a)(4). *Harcon Barge Co., Inc. v. D&G Boat Rentals, Inc.*, 784 F.2d 665 (5th Cir. March 12, 1986) (*en banc*), *petition for cert. filed*, 54 U.S.L.W. 3825 (U.S. June 9, 1986) (No. 85-2015) and *Willie v. Continental Oil Co.*, 784 F.2d 706 (5th Cir. March 12, 1986) (*en banc*). App. G, *infra*, 22a-37a. Notwithstanding that petitioners called *Harcon Barge* and *Willie* to the CAFC's attention and showed that under the rule of those cases the CAFC had no choice but to dismiss the subject appeal (which had been taken before a timely Rule 59(e) motion to alter or amend judgment was disposed of), the court refused to do so, remanding instead without opinion.[3]

Proceedings in the CIT

In October 1984, petitioners (and one other company[4]), all domestic passenger tire manufacturers, initiated an action in the CIT to challenge a deter-

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[3] Moreover, and regrettably, the CAFC's casual disposition of the important jurisdictional issue presented to it appears to reflect an impermissible, institutional bias on the part of that court against Fed. R. App. P. 4(a)(4), as is evidenced by a recent letter from the clerk of the court to an attorney in another case. App. H, *infra*, 43a. (In its entirety, App. H includes the texts of (1) the attorney's letter to the clerks of both the CIT and CAFC (38a-40a), (2) the response of the clerk of the CIT (41a-42a), and (3) the response of the clerk of the CAFC.) That bias flies in the face of the rule, as written, and as interpreted by other sister courts of appeals, as well as by this Court. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam).

[4] The B.F. Goodrich Company ("Goodrich"). For ease of discussion, reference to "petitioners" in their activities before the CIT and CAFC means the petitioners herein and Goodrich.

mination made by the United States International Trade Commission ("Commission"), under the anti-dumping law (19 U.S.C. § 1673b(a)), that there was no reasonable indication that passenger radial tires from the Republic of Korea were causing or threatening material injury to the domestic industry. *Radial Ply Tires For Passenger Cars From The Republic Of Korea*, Investigation No. 731-TA-200 (Preliminary), USITC Public. 1572 (Sept. 1984). The CIT's jurisdiction was invoked under 28 U.S.C. § 1581(c). On August 8, 1985, the CIT entered judgment for petitioners. App. B, *infra*, 3a. Specifically, the CIT reversed the Commission's determination and remanded the matter to the agency with instructions to "issue a determination consistent with this opinion." *Id.*

Notwithstanding this apparent victory, petitioners were concerned that the Commission might not act in a timely manner and might not conform its deliberations to the CIT's opinion.[5] Accordingly, petitioners filed a Rule 59(e) motion for alteration of judgment. App. I, *infra*, 44a-50a.[6] Primarily, this motion sought

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[5] The then-recent developments in a similar case, *Jeannette Sheet Glass Corporation v. United States*, CIT No. 83-5-00729, had given petitioners cause for alarm. *See* Plaintiffs' Motion for Alteration of Judgment at 4 (App. I, *infra*, 44a-50a, at 47a-48a); *see also* CIT's subsequent unreported order in *Jeannette*, demonstrating that petitioners' concerns were well-founded (App. J, *infra*, 51a-52a).

[6] CIT R. 59(e) was modeled after and is virtually the same as Fed. R. Civ. P. 59(e), except that the latter requires the motion to be served within 10 days of entry of judgment while the former specifies 30 days. The instant motion, served on Monday, August 19, 1985, i.e., 11 calendar days after the entry of judg-

to alter the judgment by (1) providing for the CIT's retention of jurisdiction to ensure that the Commission's action on remand conformed with the court's instructions and (2) establishing a specific time limitation of 32 days by which the Commission must act. On September 18, 1985, the CIT, without issuing an opinion, entered an order (prepared by the Commission) reciting that petitioners' motion was treated as a motion under CIT R. 60 (substantially the same as Fed. R. Civ. P. 60) and was denied.

Earlier, or August 15, 1985, the Commission had filed a notice of appeal to the CAFC. Neither the Commission nor any other party filed a notice of appeal after petitioners' motion for alteration of judgment was disposed of.[7]

Proceedings in the CAFC

On December 19, 1985, petitioners filed a motion to dismiss the appeal. Petitioners argued that the notice of appeal in this case was without effect, according to Fed. R. App. P. 4(a)(4) and *Griggs*, since it was nullified by petitioners' having subsequently served a timely Rule 59(e) motion in the CIT.[8]

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ment, would have been timely even had the Federal Rules applied, since the tenth day was a Sunday. *See* Fed. R. Civ. P. 6(a).

[7] While petitioners' motion for alteration of judgment was pending, petitioners' counsel informed the Commission's counsel, in writing, that he did not consider the appeal to be viable, and that he would be filing a motion to dismiss it (App. K, *infra*, 53a-54a).

[8] The CIT's decision to treat petitioners' post-judgment motion as one under Rule 60 was not controlling, as the Commission readily admitted before the CAFC.

On January 31, 1986, a CAFC judge denied the motion without separate opinion.[9] *See* App. D, *infra*, 8a-9a. On March 6, 1986, the Commission moved for remand since, on February 28, 1986, the CAFC had decided another case which stood to be controlling of one of the issues involved in the subject appeal. In their opposition filed on March 17, 1986, petitioners renewed their jurisdictional objection and called the court's attention to the Fifth Circuit's *Harcon Barge* and *Willie* opinions (App. G, *infra*, 22a-37a), which

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[9] In its order, the court said that it saw no error in the CIT's characterization of petitioners' post-judgment motion as a Rule 60 motion and it then cited, without explanation, *White v. N.H. Dep't of Employment Sec.*, 455 U.S. 445 (1982).

The reference to *White* is curious, to say the least, since *White* supports the exact opposite conclusion. In *White*, this Court ruled that a post-judgment motion for attorneys' fees under 42 U.S.C. § 1988 was not a Rule 59(e) motion because such a request raises legal issues collateral to the main cause of action. The Court found support for this conclusion from decisions that judgments on the merits may be final and appealable prior to the entry of a fee award:

> If a merits judgment is final and appealable prior to the entry of a fee award, then the remaining fee issue must be "collateral" to the decision on the merits. Conversely, the collateral character of the fee issue establishes that an outstanding fee question does not bar recognition of a meri judgment as "final" and "appealable."

455 U.S. at 452-53 n.14 (citations omitted).

In the subject case, as the respondents themselves acknowledged, had petitioners' post-judgment motion been granted, the CIT's judgment of August 8, 1985, would have been converted from a final, appealable judgment into an interlocutory order. Clearly, under *White*, the motion seeking that alteration could not be viewed as being collateral to the decision on the merits.

had just been issued on March 12, 1986. In a subsequent filing, petitioners made clear to the court their view that the court did not have jurisdiction to remand but could only dismiss the appeal.[10] On April 7, 1986, the CAFC, without opinion, remanded to the CIT. App. A, *infra*, 1a-2a.

REASONS FOR GRANTING THE PETITION

Review By This Court Is Necessary (1) To Resolve A Conflict Among The Courts Of Appeals Over An Important Jurisdictional Issue And (2) To Prevent The Wasting Of Valuable Resources Of The Judiciary And Of Litigants.

The Fifth Circuit recognized the bar's need for guidance on the filing of appeals before post-judgment motions have been resolved. The wisdom of avoiding potentially "endless hassles over proper characterization" of post-judgment motions for purposes of applying Fed. R. App. P. 4(a)(4) had become well-known. *See Harcon Barge*, 784 F.2d at 670 (App. G, *infra*, at 32a), quoting from *Western Industries*, 709 F.2d at 17. *See also* the discussion in Sacks, *supra* p. 3 (App. F, *infra*, at 21a), concluding with the advice that, "[i]f . . . it is not clear whether a post-judgment motion will be deemed an appeal-tolling motion, counsel to be safe should file a notice of appeal within 30 days of judgment and again within 30 days of disposition of the post-judgment motion."

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[10] The CAFC motions judge's previous denial of petitioners' motion to dismiss did not establish any "law of the case" or in any way diminish the CAFC panel's duty to reexamine the jurisdictional issue. *See Fischer v. United States Dep't of Justice*, 759 F.2d 461, 463 (5th Cir. 1985) (per curiam).

In this atmosphere, the Fifth Circuit endorsed a "bright-line rule" as "essential to carry out the very purpose of the 1979 amendment to Rule 4(a)(4) and to avoid wasteful confusion over the status of a previously filed notice of appeal." *Harcon Barge*, 784 F.2d at 667 (App. G, *infra*, at 25a-26a). Specifically, that court stated (*id.*; App. G, *infra*, at 25a):

> We hold that Rule 4 was not intended to apply to motions to correct purely clerical errors, but it was intended to apply to all other timely motions to amend a judgment served within ten days of the judgment, even though some such motions might also be considered timely by the district court if filed at a later date. Accordingly, we hold that any post-judgment motion to alter or amend the judgment served within ten days after the entry of the judgment, other than a motion to correct purely clerical errors covered by Rule 60(a), is within the unrestricted scope of Rule 59(e) and must, however designated by the movant, be considered as a Rule 59(e) motion for purposes of Fed.R.App.P. 4(a)(4). If, on the other hand, the motion asks for some relief other than correction of a purely clerical error and is served after the ten-day limit, then Rule 60(b) governs its timeliness and effect.

The *Harcon Barge* court's rationale leading to adoption of the bright-line rule sprang from this Court's decision in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam). The Fifth Circuit noted that therein this Court had held that a court of appeals cannot waive the jurisdictional defect pre-

sented by a notice of appeal filed before disposition of a post-judgment motion listed in Fed. R. App. P. 4(a)(4)—that such a premature notice of appeal is a "nullity," creating the same situation "as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act." *Id.* at 61; quoted in *Harcon Barge* at 668 (App. G, *infra*, at 27a). The Fifth Circuit termed the *Griggs* jurisdictional rule a "virtue" in that it is "a bright-line test signaling lawyers when a new notice of appeal is needed." *Harcon Barge* at 668 (App. G, *infra*, at 27a). That court warned, however, that the virtue of *Griggs* would be turned to vice if the courts of appeals do not complement the *Griggs* rule by adopting an equally bright-line rule for distinguishing between those post-judgment motions listed in Fed. R. App. P. 4(a)(4), which nullify a notice of appeal filed prior to their disposition, and motions not listed there, which do not affect appellate jurisdiction. *Id.* (App. G, *infra*, at 27a).

In *Harcon Barge*, as in the present appeal, the dispute centered upon whether the post-judgment motion was a motion under Rule 59(e) or 60. The Fifth Circuit acknowledged that the two rules provide overlapping relief, but that motions under the former Rule must be served within 10 days after entry of judgment, while motions under the latter Rule may arise later. *Id.* (App. G, *infra*, at 28a). The *en banc* court then stated: "When the timeliness not of the motion itself but of a notice of appeal from the judgment is involved, a court is not, however, free to choose under which rule it prefers to consider the motion made." *Id.* (App. G, *infra*, at 28a). Because of the *Griggs* rule, and because of the overlapping relief provided

by Rules 59(e) and 60, the Fifth Circuit held that it was necessary to consider as a motion under Rule 59(e) each motion that requests alteration of the judgment and is served within the allotted 10 days. *Id.* (App. G, *infra*, at 28a-29a). The only exception recognized by the court was for a motion served within the 10-day period but seeking only the correction of a purely clerical error in the judgment, which motion is under Rule 60(a) and of no effect upon an already noticed appeal. *Id.* (App. G, *infra*, at 29a). A motion cognizable under Rule 59(e), but served after the 10-day period of Rule 59(e), was held to be governed by Rule 60(b), which also renders the motion of no effect on the appeal. *Id.* at 669 (App. G, *infra*, at 31a).

Returning to the substantial policy considerations which informed its several holdings in the case, the Fifth Circuit stated in conclusion:

> As the Advisory Committee has noted, the very purpose of amending Rule 4(a)(4) was to "make it clear that after the filing of the specified post trial motions, a notice of appeal should await disposition of the motion." In addition, the appellant "should file a new notice of appeal after the motion is disposed of." [Advisory Committee note to 1979 amendment.] Confusing the issue whether a post-judgment motion was one of the "specified post trial motions" would defeat this purpose. . . .
>
> Construing a motion as a Rule 60(b) motion in order to preserve an appeal would leave the timing of a notice of appeal uncertain and introduce several troubling problems to

> our intricate maze of rules for vesting appellate jurisdiction: (1) counsel for appellants would be forced to file uncertain seriatim notices of appeal to avoid loss of substantive rights; (2) a mistake by counsel as to this timing would cost their clients substantive rights; and (3) both counsel for appellants and appellees, as well as the court, would waste valuable time briefing, debating, and deciding this jurisdictional issue. It is of great importance to have "guides sufficiently clear to prevent protective appeals and litigation over appellate jurisdiction." [15 Wright, Miller & Cooper, Federal Practice & Procedure, § 3913 at 523 (1976).] The bright-line rule established here prevents such needless waste, avoids the potential loss of litigants' substantive rights, and preserves the virtue of clarity sought by Fed.R.App.P. 4(a)(4).

784 F.2d at 670 (App. G, *infra*, at 32a-33a) (footnotes omitted).[11]

In stark contrast, the CAFC has acted as if there were no need for judicial guidance, no need even to discuss the important jurisdictional issues addressed and resolved by *Harcon Barge*. More particularly, the CAFC's decision to exercise jurisdiction over the in-

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[11] The *Harcon Barge en banc* decision was unanimous (one judge not participating), with the judges who had initially taken a contrary position now joining their colleagues on the redetermination of the issue. *See Willie*, 784 F.2d at 707 (App. G, *infra*, at 36a-37a) (specially concurring opinion of Judges Jolly, Williams, and Hill: "Today, we agree with the en banc court in *Harcon* that a bright-line rule is required in determining the applicability of the provisions of Rule 4(a)(4) . . .").

stant appeal stands in direct conflict with the Fifth Circuit's *Harcon Barge* rule. The CAFC's action herein rejects the Fifth Circuit's bright-line rule and, implicitly, the extensive analysis of Fed. R. App. P. 4(a)(4), of Rules 59(e) and 60, and of the substantial policy interests supporting the bright-line rule. However, the CAFC has offered no substitute instruction to the bar so that the seemingly endless procedural muddle and wasteful court proceedings which now prevail might be alleviated. The CAFC's action creating the conflict and perpetuating the resource-sapping confusion warrants this Court's attention.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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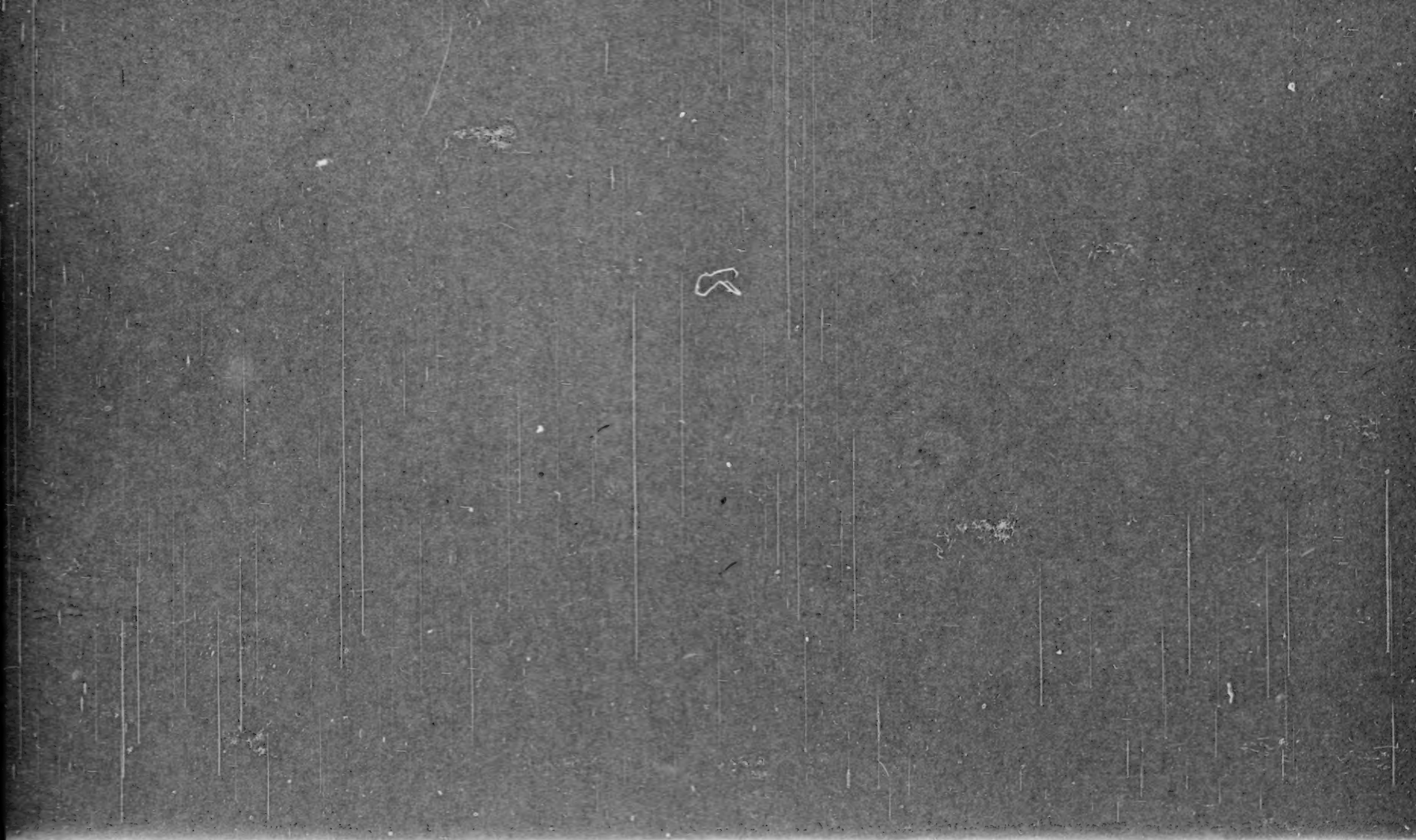
June 1986

APPENDIX A



United States Court of Appeals for the Federal Circuit

Appeal No. 85-2707

ARMSTRONG RUBBER CO., ET AL.,
Appellees,

v.

UNITED STATES,
Appellant,

and

HANKOOK TIRE MFG. CO., ET AL.,
Intervenors.

ON MOTION

Before MARKEY, *Chief Judge*, FRIEDMAN and RICH, Circuit Judge.

ORDER

The United States International Trade Commission has moved to remand this case to the Court of International Trade with instructions to vacate the judgment in *Armstrong Rubber Co. v. United States*, 614 F. Supp. 1252 (CIT 1985), light [*sic*] of our February 28, 1986, decision in *American Lamb Co. v. United States*, appeal no. 86-560 (February 28, 1986). The motion is opposed by the Armstrong Rubber Company, *et al.*

IT IS ORDERED:

(1) The motion is granted and the case is remanded to the Court of International Trade for reconsideration of its judgment in *Armstrong Rubber Co. v. United States*, 614

F. Supp. 1252 (CIT 1985) in light [*sic*] *American Lamb Co. v. United States*, appeal no. 86-560 (February 28, 1986).

(2) This court's order of November 23, 1985, staying proceedings in this appeal and establishing a future briefing schedule, is vacated.

FOR THE COURT

7 April 86
Date

/s/ HOWARD T. MARKEY
HOWARD T. MARKEY
Chief Judge

APPENDIX B

United States Court of International Trade

Court No. 84-10-01444

ARMSTRONG RUBBER CO., ET AL.,

Plaintiffs,

vs.

UNITED STATES,

Defendant.

JUDGMENT

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED:

That the determination of the International Trade Commission is reversed and remanded; and it is further

ORDERED that the International Trade Commission shall issue a determination consistent with this opinion.

/s/ JAMES L. WATSON
Judge of the United States Court of International Trade

Dated: New York, New York
August 8, 1985

APPENDIX C

UNITED STATES COURT OF INTERNATIONAL TRADE

Before WATSON, Judge

Court No. 84-10-01444

ARMSTRONG RUBBER CO., ET AL.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

Opinion and Order

The Court reverses and remands a determination by the International Trade Commission that there was no reasonable indication of material injury or threat of material injury from imports of tires from the Republic of Korea. The Court holds that the ITC applied an unlawfully stringent standard in determining whether there was a possibility of injury or threat of injury.

Decided August 8, 1985

Frederick L. Ikenson, P.C. (Frederick L. Ikenson and *J. Eric Nissley)* for plaintiffs.

Lyn M. Schlitt, General Counsel, *Michael P. Mabile,* Assistant General Counsel and *Brenda A. Jacobs* for defendant International Trade Commission.

Arnold and Porter (Thomas B. Wilner, Sukhan Kim and *Duane K. Thompson)* for defendant-intervenors Hankook Tire Manufacturing Co., Ltd., *et al.*

WATSON, Judge: In this action the Court is reviewing a determination by the International Trade Commission (ITC) that there was no reasonable indication of material injury or threat of injury from imports of tires from the Republic of Korea.[1] The determination under review terminated the investigation of a petition for the imposition of antidumping duties which had been brought by five domestic manufacturers of tires.

Plaintiffs contend that the ITC relied on an unlawfully stringent standard to determine whether or not there was a reasonable indication of material injury or threat of material injury. The ITC does not deny that the determination was inconsistent with the standards set out in this Court's decision in *Republic Steel Corp. v. United States*, 8 CIT ___, 591 F. Supp. 640 (1984), motion for rehearing denied, 8 CIT ___, Slip Op. 85-27 (March 11, 1985).

The ITC expresses its continued disagreement with that decision. However, it says nothing to change the Court's opinion that what the ITC has done here is to conduct a final investigation in the guise of an entirely different and more rudimentary proceeding. It has looked for the reality of injury, not the possibility of injury.

In the short span of this preliminary determination the ITC found an explanation for why the domestic industry was experiencing falling prices during a period of *insufficient* tire supplies; made a complex judgment of why it was the *availability* and not the significantly lower price of Korean tires that influenced purchasers; made a financial analysis of the domestic producers which tried to account for a decline in their profits, made a subtle analysis minimizing the increase of Korean imports; explained away a present increase and an expected increase in Korean

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[1] *Radial Ply Tires For Passenger Cars From The Republic of Korea*, Investigation No. 731-TA-200 (Preliminary) USITC Public. 1572, 49 Fed. Reg. 36712 (1984).

production capacity, and evaluated conflicting forecasts on the future effect of imported tires from Korea.

All this involved the operation of the full range of the ITC's expertise and represented a weighing and interpretation of conflicting evidence or a choice between competing inferences at an inappropriately early stage. This, in and of itself, shows that there was a possibility of injury or threat of injury. Once again, the Court is at a loss to see the difference between what was done here and what is supposed to be done in a final investigation. In short, it appears that the price of obtaining an investigation is being raised to the point where a petitioner must do much more than simply present the possibility of injury. This is a distortion of the law and a major interference with the legislative purpose.

Receptiveness to the conduct of investigations is a fundamental part of this law but the ITC's position displays the opposite. Its concept of what provides a "reasonable indication" is closer to what might be enough to satisfy a final determination. In fact, at one point it even speaks of "substantial evidence" as indicating that it was the availability and not the significantly lower price that led to the sales of Korean tires.

This Court has exhaustively discussed the statutory basis for the extremely low threshold in the preliminary determination of whether there is a reasonable indication of injury or threat of injury. *Republic Steel Corp., et al. v. United States*, 8 CIT ___, 591 F. Supp. 640, motion for rehearing denied, 8 CIT ___, Slip Op. 85-27 (March 11, 1985). The Court has also explained the necessity for receptiveness to investigation in *American Grape Growers Alliance For Fair Trade, et al. v. United States*, 10 CIT ___, Slip Op. 85-84 (August 8, 1985). The reasoning and language of those opinions is adopted and fully incorporated herein.

The Court of Appeals has not sanctioned anything more than the common sense rule that the Commerce Department may reject allegations which conflict with matters of public record. *See, United States v. Roses Incorporated*, 706 F2d 1563 (1983). In an opinion on the proper conduct of the first agency examination of the sufficiency of a petition the Appellate Court has certainly not sanctioned the advancement of final determinations on the merits to the preliminary stages of the investigation.

For these reasons plaintiffs' motion is granted, the ITC's determination is reversed and the matter is remanded for the issuance of a determination consistent with this opinion.

/s/ JAMES L. WATSON
JAMES L. WATSON, Judge

DATED: August 8, 1985

New York, New York

APPENDIX D

United States Court of Appeals
for the Federal Circuit

Appeal No. 85-2707

ARMSTRONG RUBBER CO., ET AL.,

Appellees,

v.

UNITED STATES,

Appellant.

ON MOTION

Before BALDWIN, *Circuit Judge.*

ORDER

This is a motion by appellee Armstrong Rubber Company (Armstrong) to dismiss the appeal on the grounds that the sole notice of appeal filed by the U.S. International Trade Commission (the ITC) was rendered a nullity as the result of Armstrong's filing of a post judgment motion under the putative authority of U.S. CIT R. 59. *Cf. Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982).

The Court of International Trade denied Armstrong's motion on September 18, 1985, expressly characterizing it as "a motion under Rule 60 of the Rules of this Court." A rule 60 motion does not affect the validity of a timely notice of appeal. 9 J. Moore, *Moores Federal Practice*, ¶ 204.12 at 4-63 *et seq.*

Having considered the submissions of the parties, and having accepted the response of the Hankook parties filed on January 13, 1986,

IT IS ORDERED THAT:

Armstrong's motion is denied. We see no error in the court's characterization of Armstrong's motion as a Rule 60 motion. No such showing has been made. Therefore, a renewed notice of appeal was not required from appellant to sustain this appeal. *White v. New Hampshire Department of Empl. Sec.*, 455 U.S. 445 (1982).

FOR THE COURT

1/29/86
Date

/s/ FRANCIS X. GINDHART
FRANCIS X. GINDHART
Clerk

FILED
Jan 31 1986

APPENDIX E

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of Right—When Taken

(a) Appeals in Civil Cases.

. . . . .

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

. . . . .

RULES OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT SUPPLEMENTING THE FEDERAL RULES OF APPELLATE PROCEDURE

INTRODUCTION

Appeals shall be governed by the Federal Rules of Appellate Procedure (FRAP), with such modifications and additions as are dictated by the nature of the court's jurisdiction. Provisions of FRAP applicable to a "District Court" shall apply to the United States Court of International Trade and the United States Claims Court. Masculine terms include the feminine equivalent.

This table reflects the relationship of the Federal Rules of Appellate Procedure to Rules of this court adopted pursuant to FRAP 1, 2, and 47:

FRAP	LOCAL RULE
3(d)	10
4(a)	10
5	10
7	10
10(a)(b)(c)(e)	9, 10, 11
11(a)(e)	11
12	11
15(a)(c)	10, 11
16(b)	9, 11
17(b)	10, 11
21	21
27	9, 11
28(a)-(i)	9, 13
28(j)	16
29	9, 13
30	12
31	13
32	12, 13, 19
34	3, 14, 15
35	19
40	19
46(a)	6

Rule 10

NOTICE OF APPEAL, TRANSMITTAL OF CERTIFIED COPY OF DOCKET ENTRIES OR CERTIFIED LIST

(a) *Courts — Appeals as of Right*

(1) *Manner of Filing; Time for Filing.* A notice of appeal shall be filed in the manner and within the time prescribed by FRAP 4(a). If, pursuant to statute, the trial court has adopted a rule which deems a document filed on the date it is transmitted by a specified type of mail, a notice of appeal shall be deemed filed in accordance with that rule.

. . . . .

FEDERAL RULES OF CIVIL PROCEDURE

Rule 59. New Trials; Amendment of Judgments

(a) Grounds

A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for motion

A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for serving affidavits

When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court

Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion

for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to alter or amend a judgment

A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 60. Relief From Judgment or Order

(a) Clerical mistakes

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within

a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

UNITED STATES COURT OF INTERNATIONAL TRADE RULES

Rule 59. New Trials—Rehearings—Amendment of Judgments

(a) Grounds

A new trial or rehearing may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion

A motion for a new trial or rehearing shall be served and filed not later than 30 days after the entry of judgment or order.

(c) Time for Serving Affidavits

When a motion for a new trial or rehearing is based upon affidavits, they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days by order of the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court

Not later than 30 days after the entry of the judgment or order, the court on its own initiative may order a new trial or rehearing for any reason for which it might have

granted a new trial or rehearing on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial or rehearing, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment

A motion to alter or amend the judgment shall be served not later than 30 days after the entry of the judgment.

Rule 60. Relief From Judgment or Order

(a) Clerical Mistakes

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after such notice, if any, as the court directs. After an appeal is filed, such mistakes may be corrected with leave of the appellate court.

(b) Mistakes, Inadvertence, Excusable Neglect—Newly Discovered Evidence—Fraud, Etc.

On motion of a party or upon its own initiative and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective ap-

plication; or (6) any other reason justifying relief from the operation of the judgment. A motion of a party shall be served and filed not later than 30 days after the judgment, order, or proceeding was entered or taken. The court, upon its own initiative, may also grant relief from a judgment or order as prescribed by this rule not later than 30 days after the date of entry of the judgment or order.

This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in 28 U.S.C. § 1655, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

APPENDIX F

The Proper Time to File a Notice of Appeal

by Leonard Sacks

When is the proper time to file a notice of appeal from a district court judgment or order? A number of recent federal decisions have demonstrated the complexity of this seemingly simple question.

In civil practice, the basic rule expressed in Federal Rule of Appellate Procedure 4(a)(1) is that a notice of appeal must be filed "within 30 days after the entry of the judgment or order appealed from." (An extra 30 days are given when the United States or its officers are parties to the suit).

The seeming clarity of F.R.A.P. 4(a)(1) is clouded by Rule 4(a)(4) which provides that if *certain* post-judgment motions are made in the district court, the time for filing the notice of appeal is delayed until thirty days after the entry of an order granting or denying that motion. The motions enumerated in Rule 4(a)(4) are: F.R.C.P. 50(b)—motion for judgment notwithstanding the verdict; F.R.C.P. 52(b)—motion to amend or make additional findings of fact; and F.R.C.P. 59—motion to alter or amend the judgment or for a new trial.

Certain courts have used broad language in order to preserve appeals by construing motions that had been made to be within the category of those tolling the time for noticing an appeal under Rule 4(a)(4). For example, in *Fischer v. United States*, 759 F.2d 461 (5th Cir. 1985) the Fifth Circuit recently held a Rule 60(b) (relief from judgment for mistake) motion to be in essence a 59(e) motion (to alter or amend the judgment) thus preserving an appeal.

However, it is not always predictable whether a given post-judgment motion will be deemed to be one which tolls the running of time for noticing an appeal. For example, in *In re Lovitt*, 757 F.2d 1035 (9th Cir. 1985) the Ninth Circuit refused to deem a bankruptcy rehearing motion as one which would toll the time for filing the notice. Another controversy was created in the wake of *White v. New Hampshire*, 455 U.S. 445, 102 S. Ct. 1162 (1982). In *White* a request for attorneys' fees under 42 U.S.C. 1988 (Civil Rights Attorneys' Fees Awards Act) was deemed not to have been a Rule 59(e) motion since it was collateral to the main cause of action.

These decisions make abundantly clear the danger of delaying the filing of a notice of appeal while post-judgment motions are pending in the district court. A given motion might not be deemed as having tolled the time for filing the notice of appeal. And of course, timeliness of an appeal is "mandatory and jurisdictional." *See Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 98 S. Ct. 556 (1978).

Another recent case, however, *Greater Houston Chapter of the ACLU v. Eckels*, 755 F.2d 426 (5th Cir. 1985) shows the danger of relying on a *premature* notice of appeal. In *Greater Houston*, the district court filed findings of fact and conclusions of law. Prior to entry of judgment, defendant filed a motion for new trial pursuant to F.R.C.P. 59(a). The district court entered judgment while the motion for new trial was pending. After entry of judgment, but prior to disposition of the motion for a new trial, defendant filed a notice of appeal. Shortly after, the district court denied the motion for a new trial. Defendant did *not* file a new notice of appeal.

The Fifth Circuit dismissed the appeal because of defendant's failure to file a notice of appeal *after* the denial of the motion for new trial. The Court relied on F.R.A.P. 4(a)(4), which requires a notice of appeal to be filed after

"disposition" of the motion for a new trial, and on the Supreme Court's decision in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S. Ct. 400 (1982), holding that "a premature notice of appeal shall have no effect."

Greater Houston, supra, highlights what Justice Marshall in his dissent in *Griggs* termed the "Draconian" impact of F.R.A.P. 4(a)(4). The Rule itself, however, provides a way to avoid this dilemma. When a post-judgment motion is clearly one within the purview of Rule 4(a)(4), a party may safely wait to file a notice of appeal until after the entry of an order on that motion. If, however, it is not clear whether a post-judgment motion will be deemed an appeal-tolling motion, counsel to be safe should file a notice of appeal within 30 days of judgment and again within 30 days of disposition of the post-judgment motion. In this manner, counsel can avoid the danger of *Greater Houston* if the post-judgment motion is deemed a Rule 59 motion (the first notice of appeal "shall have no effect") and insure a timely appeal if the post-judgment motion is deemed not to have tolled the appeal period. F.R.A.P. 4(a)(4) provides that "no additional fees shall be required for (a second) filing."

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-4584
OPINION

HARCON BARGE, CO., INC.,
Plaintiff-Appellee,

v.

D & G BOAT RENTALS, INC.,
Defendant Third-Party Plaintiff-Appellant,
and

M/V CHARLES D,
Defendant-Appellee, Cross-Appellant,

v.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Third-Party Defendant, Appellant-Cross-Appellee.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff-Appellant,

v.

M/V I. C. HOSKINS, Her Engines,
Boilers, Tackle, Etc., In Rem,
Defendant-Appellee.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff-Appellant,

v.

M/V IBERVILLE, Her Engines,
Boilers, Tackle, Etc., In Rem, ET AL.,
Defendants-Appellees.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff-Appellant, Cross-Appellee,

v.

M/V CHARLES D, Her Engines,
Boilers, Tackle, Etc., In Rem, and
D & G BOAT RENTALS, INC.,
Defendants-Appellees, Cross-Appellants.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff-Appellant, Cross-Appellee,

v.

M/V MARION HAGESTAD, ET AL.,
Defendants-Appellees, Cross-Appellants.

Filed March 12, 1986

Before Clark, Chief Judge, Gee, Rubin, Reavley, Politz, Tate,
Johnson, Williams, Garwood, Jolly, Higginbotham, Davis, Hill,
and Jones, Circuit Judges.*

Opinion by Judges Alvin B. Rubin and Albert Tate

Appeals from the United States District Court

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* Judge Randall did not participate in this decision.

for the Western District of Louisiana
John M. Shaw, District Judge, Presiding

OPINION

ALVIN B. RUBIN and ALBERT TATE, Circuit Judges:

Rule 59 of the Federal Rules of Civil Procedure requires that a motion to alter or amend a district court judgment must be served within ten days from the entry of judgment. Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides than [*sic*] an appeal is premature if taken before the disposition of a timely-served motion to amend the district court's judgment, filed under Rule 59. Rule 4 does not apply in express terms to a motion filed under Rule 60(a) of the Federal Rules of Civil Procedure pursuant to which a motion may be filed in the district court to correct clerical mistakes at any time, or under Rule 60(b) to seek relief from a judgment that is erroneous for other stated reasons, which may be filed within a reasonable time after entry of judgment. A motion filed under Rule 60 does not, therefore, nullify a previously filed notice of appeal.

In determining whether this court has jurisdiction of an appeal, two of our panels have differed in their characterization of a post-judgment motion to amend the district court's judgment filed within ten days after entry of the judgment. In *Harcon Barge Co. v. D & G Boat Rentals, Inc.*,[1] the panel held that a post-judgment motion to amend (described as such by the moving parties who sought to avoid the taxing of costs against them), timely served within the ten-day limit in Fed. R. Civ. P. 59(e), was a Rule 59(e) motion and had the effect under Fed. R. App. P. 4(a)(4) of nullifying a previously filed notice of appeal. The panel concluded that it lacked jurisdiction and dis-

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[1] 746 F.2d 278, 288-90 (5th Cir. 1984).

missed the appeal.[2] On the other hand, in *Willie v. Continental Oil Co.*[3] the panel characterized a motion to amend the judgment to conform to pretrial stipulations, served within the ten-day limit, not as a Rule 59(e) motion but as a Rule 60(b)(1) motion. The panel concluded that, under Fed. R. App. P. 4(a)(4), the notice of appeal filed before the motion to amend (which it characterized as filed under Rule 60(b)(1)) remained valid and divested the district court of jurisdiction. To resolve that conflict, this court ordered rehearing en banc in *Harcon Barge*, as to Part III of that opinion,[4] and in *Willie*.[5]

If Fed. R. App. P. 4 did not apply to any Rule 60 motion, its effect would be drastically curtailed, for Rule 60(b)(6) permits the filing of a motion for "any other reason justifying relief from the operation of the judgment." We hold that Rule 4 was not intended to apply to motions to correct purely clerical errors, but it was intended to apply to all other timely motions to amend a judgment served within ten days of the judgment, even though some such motions might also be considered timely by the district court if filed at a later date. Accordingly, we hold that any post-judgment motion to alter or amend the judgment served within ten days after the entry of the judgment, other than a motion to correct purely clerical errors covered by Rule 60(a), is within the unrestricted scope of Rule 59(e) and must, however designated by the movant, be considered as a Rule 59(e) motion for purposes of Fed. R. App. P. 4(a)(4). If, on the other hand, the motion asks for some relief other than correction of a purely clerical error and is served after the ten-day limit, then Rule 60(b) governs its timeliness and effect. A bright-line rule is es-

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[2] *Id.* at 289-90.

[3] 746 F.2d 1041, 1044-45 (5th Cir. 1984).

[4] 760 F.2d 86 (5th Cir. 1985) (ordering rehearing en banc).

[5] 760 F.2d 87 (5th Cir. 1985) (ordering rehearing en banc).

sential to carry out the very purpose of the 1979 amendment to Rule 4(a)(4) and to avoid wasteful confusion over the status of a previously filed notice of appeal.

I.

We detail only those facts necessary for this rehearing.[6] A single judgment was rendered in the five consolidated actions involved at trial. On the same day a notice of appeal was timely filed by one party, opposing parties filed, and then timely served, a "Motion to Amend Judgment" seeking to have the judgment amended to relieve the moving defendants from liability for costs. The basis for the costs motion was that these parties had made an offer of judgment in an amount greater than that actually awarded by the judgment and the contention that, under Fed. R. Civ. P. 68, they were entitled to be relieved from bearing any costs incurred subsequent to their offer. The district court granted their motion and filed an amended judgment that exonerated the moving defendants from liability for the disputed costs. No further notice of appeal was filed after entry of the amended judgment. On appeal, a panel of this court held that the motion was one "to alter or amend the judgment" within the meaning of Fed. R. Civ. P. 59(e), and it nullified the previously filed notice of appeal. The failure of the appellants to file a later notice of appeal meant that there was no valid notice of appeal, and this court lacked jurisdiction. The panel therefore dismissed the appeal.

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[6] For a fuller factual background, refer to the panel opinion in *Harcon Barge*, 746 F.2d 278 (5th Cir. 1984).

II.

Fed. R. App. P. 4(a)(4) specifies several post-judgment motions, including those under Fed. R. Civ. P. 59, which must be disposed of before an effective notice of appeal can be filed. The rule provides that the time for filing a notice of appeal shall run from the entry of the order denying a new trial or granting or denying any of the other motions listed in Rule 4(a)(4). In addition, the rule specifies that a notice of appeal filed before the disposition of any of the listed motions shall have no effect, and a new notice of appeal must be filed within the designated time after disposition of those motions through entry of an order. A party failing to file a new notice of appeal loses its right to appeal.

In *Griggs v. Provident Consumer Discount Co.*,[7] the Supreme Court held that a court of appeals cannot waive the defect of prematurity of a notice of appeal filed before the entry of an order disposing of one of the motions listed in Rule 4(a)(4). Such a premature notice of appeal is a "nullity," and "it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act."[8]

Despite the harsh effect of the *Griggs* jurisdictional rule, this interpretation of Rule 4(a)(4) provides a bright-line test signaling lawyers when a new notice of appeal is needed. This virtue, however, can be turned to vice if the courts of appeals do not complement the *Griggs* rule with an equally bright-line rule distinguishing between those motions considered to be within the rules listed in Rule 4(a)(4), and nullifying previously filed notices of appeal, and those motions considered to be filed under other rules not listed in Rule 4(a)(4) and thus devoid of an effect on appellate

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[7] 459 U.S. 56, 103 S.Ct. 400 (1982) (per curiam).

[8] 450 [*sic*: 459] U.S. at 61, 103 S.Ct. at 403.

jurisdiction. The two rules involved in the *Harcon Barge* and *Willie* cases are Rules 59(e) and Rule 60.

A.

In the instant case, the moving defendants sought to amend the judgment of the district court as to the costs assessed to them. They styled their motion as one to amend or alter the judgment and they served it within ten days after the entry of the judgment. The motion sought relief available under Rule 59(e), did not seek merely to correct a clerical error in the judgment, and was served within that rule's time limits. Although the motion itself does not specify under which rule it was being brought, it nevertheless falls squarely within the province of Rule 59(e).

In *Willie,* the movants sought to change the court's judgment to reflect the terms of a pretrial stipulation regarding one of the parties' cross-claims. They styled their motion as a "Motion to Amend Judgment," but as in *Harcon Barge,* the motion itself did not state under which rule it was being brought. The *Willie* panel held that it was brought under Rule 60(b)(1), even though the motion was served within ten days after the entry of the disputed judgment.

It is patent that Rule 59(e) and Rule 60 provide overlapping relief.[9] Motions under Rule 59(e) must be filed and served within ten days, but those listed in Rule 60(a) and (b) may be filed at a later date. When the timeliness not of the motion itself but of a notice of appeal from the judgment is involved, a court is not, however, free to choose under which rule it prefers to consider the motion made. If a motion falls within the scope of Rule 59(e), and it is timely served within ten days after entry of judgment as that rule requires, then the court must consider it as

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[9] 11 Wright and Miller, Federal Practice and Procedure, § 2817 at 110-13 (1973).

a Rule 59(e) motion for the purposes of Fed. R. App. P. 4(a)(4), regardless of how it is styled. The only qualification to this rule is that, even when made within the ten-day period, so important to Rule 59(e), a motion seeking to correct purely clerical errors and mistakes is a Rule 60(a) motion and therefore it does not void a previously filed notice of appeal under Fed. R. App. P. 4(a)(4).

The scope of Rule 60(a) is, as we have noted, very limited. In *Dura-Wood Treating Co., Division of Roy O. Martin Lumber Co. v. Century Forest Industries, Inc.*,[10] the court set out these limits:

> Rule 60(a) finds application where the record makes apparent that the court intended one thing but by merely clerical mistake or oversight did another. Such a mistake must not be one of judgment or even of misidentification, but merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature. . . . If of this sort, it matters not whether the magistrate committed it—as by mistakenly drafting his own judgment—or whether his clerk did so . . . the law does not regard such trifles. In such instances the judgment can be corrected to speak the truth. (Citations omitted).

Thus, it is proper to use Rule 60(a) to correct a damages award that is incorrect because it is based on an erroneous mathematical computation, whether the error is made by the jury[11] or by the court.[12] "Errors of a more substantial nature are to be corrected by a motion under Rules 59(e)

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[10] 694 F.2d 112, 114 (5th Cir. 1982).

[11] *United States ex rel. Mississippi Road Supply Co. v. H. R. Morgan, Inc.*, 542 F.2d 262, 269 (5th Cir. 1976), *cert. denied*, 434 U.S. 828, 98 S.Ct. 106 (1977).

[12] *Chavez v. Balesh*, 704 F.2d 774, 776-77 (5th Cir. 1983).

or 60(b)."[13] Correction of an error of "substantive judgment," therefore, is outside the reach of Rule 60(a).[14]

Three other circuits have analyzed the separate roles of Rule 59(e), to alter and amend the judgment, and Rule 60(a), to correct the court's clerical mistakes. In *Miller v. Transamerican Press, Inc.*,[15] the Ninth Circuit held that a court derives its power to correct clerical errors, such as the failure to memorialize part of a decision, from Rule 60(a) and not Rule 59(e). The Tenth Circuit took a similar view in *St. Paul Fire & Marine Insurance Co. v. Continental Casualty Co.*,[16] holding that "[m]otions seeking mere technical changes in the form of a judgment are not Rule 59(e) motions and do not toll the time for filing notice of appeal; rather, they are akin to Rule 60(a) motions to correct clerical errors in a judgment." Finally, the Third Circuit held in *Hayden v. Scott Aviation, Inc.*,[17] that correcting a failure to include non-discretionary pre-judgment interest is governed by Rule 60(a), not Rule 59(e).

While Rule 60(a), providing for the correction of clerical errors, limits the otherwise unrestricted scope of Rule 59(e), the same cannot be said of Rule 60(b). Rule 60(b) permits certain specifically described motions to be filed at a time later than ten days after entry of judgment. The

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[13] 11 Wright and Miller, Federal Practice and Procedure, § 2854 at 149 (1973).

[14] *Jones v. Anderson-Tully Co.*, 722 F.2d 211, 212 (5th Cir. 1983); *Trahan v. First National Bank of Ruston*, 720 F.2d 832, 833-34 (5th Cir. 1983), *judgment of district court aff'd*, 747 F.2d 990 (5th Cir. 1984) (per curiam); *See also, In re Galiardi*, 745 F.2d 335, 337 (5th Cir. 1984); *Warner v. City of Bay St. Louis*, 526 F.2d 1211, 1212 (5th Cir. 1976), *judgment of district court aff'd*, 552 F.2d 583 (5th Cir. 1977) (per curiam); *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*, 213 F.2d 702, 705 (5th Cir. 1954).

[15] 709 F.2d 524, 527-28 (9th Cir. 1983).

[16] 684 F.2d 691, 693 (10th Cir. 1982).

[17] 684 F.2d 270, 271-72 (3d Cir. 1982).

rule allows relief from a judgment for a number of stated grounds but provides that a motion invoking the first three grounds must be made within a reasonable time not to exceed one year after entry of judgment.[18] Thus, while Rules 59(e) and 60(b) permit the same relief—a change in the judgment—Rule 60(b) extends the time within which relief can be sought. Rule 60(b) relief may be invoked, however, only for the causes specifically stated in the rule and, we hold, only after ten days following entry of judgment. If a motion is served within those ten days and may be characterized as a Rule 59(e) motion, it must be so treated, for Rule 4 of the Federal Rules of Appellate Procedure makes timing a fundamental consideration in classifying the motion as brought under Rule 59(e) or under Rule 60(b).

B.

Professor Moore states that, "[a]ny motion that draws into question the correctness of a judgment is functionally a motion under Civil Rule 59(e), whatever its label."[19] Virtually every circuit court has held that a motion that "calls into question the correctness of a judgment should be treated as a motion under Rule 59(e), however it is styled."[20] In *Fischer v. United States Department of Jus-*

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[18] Fed. R. Civ. P. 60(b).

[19] 9 Moore's Federal Practice ¶ 204.12[1] at 4-67 (1985). *See also id.* ¶ 204.12[1] at 4-69 (1985).

[20] *Dove v. Codesco*, 569 F.2d 807, 809 (4th Cir. 1978). *Accord Cosgrove v. Smith*, 697 F.2d 1125, 1127-28 (D.C. Cir. 1983); *Foman v. Davis*, 292 F.2d 85, 87 (1st Cir. 1961), *rev'd on other grounds*, 371 U.S. 178, 83 S.Ct. 227 (1962); *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 41 (2d Cir. 1982); *Rankin v. Heckler*, 761 F.2d 936, 942 (3d Cir. 1985); *Western Industries, Inc. v. Newcor Canada Ltd.*, 709 F.2d 16, 17 (7th Cir. 1983) (per curiam); *Seshachalam v. Creighton University School of Medicine*, 545 F.2d 1147, 1147 (8th Cir. 1976), *cert. denied*, 433 U.S. 909, 97 S.Ct. 2974 (1977); *Sea Ranch Association v. California Coastal Zone Conservation Commissions*, 537 F.2d 1058, 1061 (9th Cir. 1976),

tice,[21] another panel of this circuit recently noted general support for the principle. Although on several other occasions the Fifth Circuit has dealt with the issue of whether a motion to rehear, reconsider, or amend a judgment should be considered as one made under Rule 59(e) or under Rule 60, no definitive rule has developed.[22]

As the Advisory Committee has noted, the very purpose of amending Rule 4(a)(4) was to "make it clear that after the filing of the specified post trial motions, a notice of appeal should await disposition of the motion." In addition, the appellant "should file a new notice of appeal after the motion is disposed of."[23] Confusing the issue whether a post-judgment motion was one of the "specified post trial motions" would defeat this purpose. As the Seventh Circuit noted in *Western Industries, Inc. v. Newcor Canada Ltd.*,[24] "[p]ost-judgment motions filed within 10 days should where possible be construed as Rule 59(e) motions to avoid otherwise endless hassles over proper characterization."

Construing a motion as a Rule 60(b) motion in order to preserve an appeal would leave the timing of a notice of appeal uncertain and introduce several troubling problems to our intricate maze of rules for vesting appellate juris-

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but see United States v. 1982 Sanger 24' Spectra Boat, 738 F.2d 1043 (9th Cir. 1984); *Miller v. Leavenworth-Jefferson Electric Cooperative, Inc.*, 653 F.2d 1378, 1380 (10th Cir. 1981).

[21] 759 F.2d 401, 464 & n.4 (5th Cir. 1985) (per curiam) (noting conflict between *Harcon Barge* and *Willie*).

[22] *See Fabian v. Reed*, 707 F.2d 147, 148 n.l. (5th Cir. 1983), *certificate denied and appeal dismissed*, 714 F.2d 39 (5th Cir. 1983) (per curiam); *Lapeyrouse v. Texaco, Inc.*, 670 F.2d 503, 583-84 [*sic*: 503-04] (5th Cir. 1982); *Woodham v. American Cystoscope Co. of Pelham, N.Y.*, 335 F.2d 551, 554-55 (5th Cir. 1964); *Southern States Equipment Corp. v. USCO Power Equipment Corp.*, 209 F.2d 111, 116-17 (5th Cir. 1953).

[23] Fed. R. App. P. 4(a)(4) Advisory Committee note to 1979 amendment.

[24] 709 F.2d at 17.

diction: (1) counsel for appellants would be forced to file seriatim notices of appeal to avoid loss of substantive rights; (2) a mistake by counsel as to this timing would cost their clients substantive rights; and (3) both counsel for appellants and appellees, as well as the court, would waste valuable time briefing, debating, and deciding this jurisdictional issue. It is of great importance to have "guides sufficiently clear to prevent protective appeals and litigation over appellate jurisdiction."[25] The bright-line rule established here prevents such needless waste, avoids the potential loss of litigants' substantive rights, and preserves the virtue of clarity sought by Fed. R. App. P. 4(a)(4).

CONCLUSION

For the foregoing reasons, we dismiss the appeal of the appellant, Southern Pacific, who shall bear the costs.

APPEAL DISMISSED.

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[25] 15 Wright, Miller & Cooper, Federal Practice & Procedure, § 3913 at 523 (1976).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 83-3682&
84-3848

OPINION

STEVE WILLIE,
Plaintiff-Appellee, Cross-Appellant,
v.

CONTINENTAL OIL CO., ET AL.,
Defendants,
OFFSHORE LOGISTICS, INC.,
Defendant-Appellant, Cross-Appellee.

Filed March 12, 1986

Before: Clark, Chief Judge, Gee, Rubin, Reavley, Politz, Tate, Johnson, Williams, Garwood, Jolly, Higginbotham, Davis, Hill, and Jones, Circuit Judges.*

Opinion by Judges Alvin B. Rubin and Albert Tate; Concurrence by Judge E. Grady Jolly

Appeals from the United States District Court
for the Eastern District of Louisiana
Robert F. Collins, District Judge, Presiding

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* Judge Randall did not participate in this decision.

OPINION

ALVIN B. RUBIN and ALBERT TATE, Circuit Judges:

Two panels of this court reached conflicting decisions concerning the classification of a post-judgment motion to amend the district court's judgment. *Compare Harcon Barge Co. v. D & G Boat Rentals, Inc.*,[1] *with Willie v. Continental Oil Co.*[2] *Willie* allowed a court discretion to classify a post-judgment motion as invoking either Rule 59(e) or Rule 60. *Harcon Barge,* on the other hand, held that, if a post-judgment motion falls within the scope of Fed. R. Civ. P. 59(e), and it is timely served within ten days after entry of judgment as the rule requires, then the court must consider it a Rule 59(e) motion for the purposes of Fed. R. App. P. 4(a)(4), however it may be styled. The court, therefore, ordered both reheard en banc.

In *Willie,*[3] one of the parties filed and served a "Motion to Amend Judgment" within ten days after the entry of the disputed judgment. Shortly thereafter, the appellant and cross-appellant filed their notices of appeal. The district court subsequently granted the motion to amend on December 2, 1983. In our en banc decision today in *Harcon Barge,* we hold that any motion to amend a judgment served within ten days after the entry of judgment, except for a proper Rule 60(a) motion to correct purely clerical errors, is to be considered a Rule 59(e) motion. As such, it suspends the time for filing a notice of appeal and ren-

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[1] 746 F.2d 278 (5th Cir. 1984), *vacated,* 760 F.2d 86 (5th Cir. 1985) (ordering rehearing en banc), *appeal dismissed,* ___ F.2d ___, No. 82-4584, slip op. (5th Cir. ___ ___, 1986) (en banc).

[2] 746 F.2d 1041 (5th Cir. 1984), *vacated,* 760 F.2d 87 (5th Cir. 1985) (ordering rehearing en banc).

[3] A full description of the facts can be found in the panel opinion, *Willie v. Continental Oil Co.,* 746 F.2d 1041 (5th Cir. 1984). We give only those facts necessary for the rehearing.

ders premature any notice of appeal previously filed.[4] In accordance with that decision, we hold that the motion to amend the judgment in this case was a Rule 59(e) motion, and the previously filed notices of appeal were null under Fed. R. App. P. 4(a)(4). No notices of appeal were filed after the amended judgment was entered on December 2, 1983, and the time for filing has long since expired. This court, therefore, lacks jurisdiction to hear the appeal.

We therefore order that the appeal in this case be dismissed, and the district court's amended judgment of December 2, 1983 be reinstated. Costs shall be borne equally by the appellant and cross-appellant.

APPEAL DISMISSED.

E. GRADY JOLLY, Circuit Judge, with whom JERRE S. WILLIAMS and ROBERT M. HILL, Circuit Judges, join, specially concurring:

When the panel wrote its opinion in this case, there was, as has been noted by the en banc opinion in *Harcon Barge v. D & G Boat Rentals, Inc.*, ___ F.2d ___, No. 82-4584, slip op. at ___, 1986 (en banc), no exact method delineated in the cases of our circuit for treating motions to amend judgment. In other words, until today there has been no bright-line rule in our circuit distinguishing which post-judgment motions are to be treated under Rule 59(e) and which under Rule 60, the rules overlapping as they do. The panel, therefore, saved the appeal by holding that the motion in this case could be properly treated as a Rule 60(b) motion.

Today, we agree with the en banc court in *Harcon* that a bright-line rule is required in determining the applica-

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[4] ___ F.2d ___, No. 82-4584, slip op. at ___ (5th Cir. ___ ___, 1986) (en banc).

bility of the provisions of Rule 4(a)(4), Federal Rules of Appellate Procedure, to post-judgment motions. Accordingly, we are willing to acquiesce in the holding the court has reached that all motions served within ten days of entry of judgment (except those relating to clerical errors), are to be treated under Rule 59(e). We therefore concur in the result reached in this case that there was no timely notice of appeal filed and hence we have no jurisdiction to hear this appeal.

APPENDIX H

LAW OFFICES
TANAKA WALDERS & RITGER
1919 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006
202-223-1670

December 23, 1985

Clerk of the Court
U.S. Court of International Trade
One Federal Plaza
New York, N.Y. 10007

Clerk of the Court
U.S. Court of Appeals for the
Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Re: NEC Corporation v. The United States
CIT No. 85-7-00948
CAFC No. 86-741

Dear Sirs:

On behalf of the plaintiff in the above referenced case, we filed a Notice Of Appeal on December 4, 1985. This Notice evidenced our intent to appeal the decision in slip op. 85-116.

On December 6, 1985, we filed a Motion For Rehearing And Amendment Of Judgment. By this Motion, we are seeking to reverse slip op. 85-116.

CAFC Rule 10(a)(1) prescribes that "a notice of appeal shall be filed in the manner and within the time prescribed by FRAP 4(a)". Germane to the current situation is Federal Rules of Appellate Procedure (FRAP) Rule 4(a)(4). Relevant portions of that provision read as follows:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: . . . (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

The current situation is analogous to the situation quoted in the above excerpt from FRAP Rule 4(a)(4). We have filed a timely motion in the CIT for a rehearing. The distinction between our situation and that described in FRAP Rule 4(a)(4) is that our motion was not filed under the Federal Rules of Civil Procedure and was not filed in a district court.

Because of these distinctions between our situation and the situation described in FRAP Rule 4(a)(4), we have proceeded as though FRAP Rule 4(a)(4) did not apply to our situation. However, we wish to bring this matter to your attention in case the CIT and/or the CAFC have interpreted FRAP Rule 4(a)(4) differently. Please be advised that we are willing to abide by the provisions of FRAP Rule 4(a)(4), if that is the desire of the CIT. Until we receive a response to this letter, we will continue to assume that FRAP Rule 4(a)(4) does not apply and move forward with both our appeal and our Motion.

Sincerely,

/s/ PATRICK F. O'LEARY
PATRICK F. O'LEARY

cc: Velta Melnbrencis, Esq.
PFO:jd

United States Court
of International Trade
OFFICE OF THE CLERK

One Federal Plaza
New York, N.Y. 10007

December 27, 1985

Patrick F. O'Leary, Esq.
Tanaka Walders & Ritger
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: NEC Corporation v. United States CIT
No. 85-7-00948; CAFC No. 86-741

Dear Mr. O'Leary:

This is in response to your letter, dated December 23, 1985, pertaining to the Notice of Appeal and the Motion for Rehearing and Amendment of Judgment you filed in this action.

I appreciate the situation described in your letter, but can make no specific response to your question pertaining to the desire of this court to have you proceed pursuant to the provisions of FRAP Rule 4(a)(4). However, I do wish to call your attention to the sentence, which appears in the introduction to the Rules of the United States Court of Appeals for the Federal Circuit, which provides: "Provisions of FRAP applicable to a 'District Court' shall apply to the United States Court of International Trade and the United States Claims Court."

Sincerely yours,

/s/ JOSEPH E. LOMBARDI
JOSEPH E. LOMBARDI
Clerk of Court

cc: Francis C. Gindhart, Clerk
United States Court of Appeals
for the Federal Circuit

Velta A. Melnbrencis, Esq.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20439

January 14, 1986

Patrick F. O'Leary
Tanaka Ritger & Middleton
1919 Pennsylvania Avenue, N.W.
Suite 303
Washington, D.C. 20005

RE: NEC Corporation v. The United States
Appeal No. 86-741

Dear Mr. O'Leary:

This will respond to your letter of December 23, 1985. I also have a copy of Mr. Lombardi's letter of December 27, 1985, to you, as well as a copy of Judge Watson's memorandun [*sic*] opinion and order of January 10, 1986.

Under the circumstances of this case, no action will be taken in this Court to dismiss the appeal under rule 4(a)(4) of the Federal Rules of Appellate Procedure or to require that a new notice of appeal be filed following Judge Watson's order on January 10, 1986.

Very truly yours,

/s/ FRANCIS X. GINDHART

cc: Velta A. Melnbrencis, Esq.
Mr. Joseph E. Lombardi

FXG:bam

APPENDIX I

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE: HON. JAMES L. WATSON, JUDGE

Court No. 84-10-01444

THE ARMSTRONG RUBBER COMPANY, ET AL.,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

PLAINTIFFS' MOTION FOR ALTERATION OF JUDGMENT

Pursuant to USCIT R. 59(e), plaintiffs respectfully move for an alteration of the judgment of this Court, entered in the above-captioned action, on August 8, 1985. In that judgment, the Court reversed the determination of the International Trade Commission ("ITC") in the case of *Radial Ply Tires From the Republic of Korea*, Investigation No. 731-TA-200 (Preliminary), USITC Public. 1572 (1984), and remanded the matter to the ITC with instructions to "issue a determination consistent with this opinion" [Slip Op. 85-85]. By this motion, we specifically request that the judgment be amended to provide that the ITC issue that determination and report it to the Court as soon as possible but in no event later than September 9, 1985, i.e., 32 days after the entry of this Court's Opinion and Order. Alternatively, and at the very least, we urge the Court to amend its judgment to require the ITC to abide by the aforementioned deadline. The reasons for this motion follow.

On Friday, August 9, 1985, the undersigned Frederick L. Ikenson ("plaintiffs' counsel") first received a copy of

the Opinion and Order and noticed that the order (judgment) did not specify a date certain by which the ITC must issue its new determination. On Monday, August 12, 1985, plaintiffs' counsel contacted the ITC's General Counsel, Ms. Schlitt, and advised that, in order to ensure against undue delay, he was giving consideration to filing a motion for alteration of the judgment in order to provide a date certain (specifically, 30 days after the Court's order) by which the ITC must issue its determination on remand. The General Counsel stated that the ITC would not act dilatorily but she was not prepared to make a commitment that a determination would be issued within 30 days. Plaintiffs' counsel made clear that he would not insist on a firm commitment but would be content to receive a good faith indication from the General Counsel that it would be reasonable to expect a determination within 30 days. The General Counsel stated that she or her Deputy, Mr. Mabile, would respond to plaintiffs' counsel later in the week.

The next conversation between plaintiffs' counsel and the General Counsel's office occurred in the afternoon of Thursday, August 15, 1985, when Mr. Mabile returned plaintiffs' counsel's telephone call of earlier that day. Mr. Mabile advised that the ITC had filed a notice of appeal from this Court's decision of August 8, 1985. As for the matter which plaintiffs' counsel discussed with the General Counsel, Mr. Mabile advised that his office needed until the next day (Friday, August 16, 1985) or possibly Monday (August 19, 1985) to advise of the ITC's intentions.[1]

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[1] Needless to say, the ITC's swift filing of a notice of appeal—after we had already informed their counsel of our considering filing a Rule 59(e) motion to alter the judgment—came as a surprise to us. Surely, the ITC's counsel must have understood that the filing of a Rule 59(e) motion would nullify any appeal taken prior thereto. FRAP 4(a)(4) is explicit on this subject. *See* 9 J. Moore, B Ward & J. Lucas, *Moore's Federal Practice* ¶ 203.11 at 3-48—3-50 and ¶ 204.12 at 4-64—4-65 (2d ed. 1985); *Western Industries, Inc. v. Newcor Canada Limited*, 709 F.2d 16, 17 (7th Cir. 1983) ("[I]f a party that wants to appeal a district court judgment files

On Friday, August 16, 1985, at approximately 11:35 A.M., plaintiffs' counsel again called Mr. Mabile to learn whether it was reasonable to expect the ITC to issue its new determination promptly or in any event before September 9, 1985.[2] Mr. Mabile was not available but on this date, Monday, August 19, 1985, at about 2:00 P.M., Mr. Mabile returned plaintiffs' counsel's call and advised that (a) he could not indicate when the ITC would take action on the remand instruction and (b), in any event, the ITC would move for a stay.

Because of our continuing concern that there not be undue delay in the issuance of the ITC's determination—since the Commerce Department will not resume its antidumping investigation until the ITC issues its new de-

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his notice of appeal within 10 days of entry of judgment, as the defendant did here, he runs the risk that our jurisdiction over his appeal will be divested by the other party's filing a Rule 59(e) motion, as he is entitled to do, within the same 10-day period."); *Smith v. United States Parole Commission*, 721 F.2d 346 (11th Cir. 1983); *Alamo Chemical Transportation Co. v. M/V Overseas Valdes*, 726 F.2d 1073 (5th Cir. 1984). The following from *Moore's Federal Practice*, *supra*, ¶ 203.11 at 3-50 is very much in point:

> In 1979, [FRAP] Rule 4(a) was amended to provide that if a timely motion under Rule 50(b), 52(b), or 59, is filed, a notice of appeal filed before the disposition of such motion *shall have no effect* and a new notice of appeal must be filed within the appeal time measured from the entry of the order disposing of the motion. Thus in effect the filing of a motion of the sort under consideration destroys the finality of the judgment and nullifies a previously filed notice of appeal, thus reviving the jurisdiction of the district court without the necessity of remand.

(Emphasis in original; footnotes omitted.)

The ITC would have put its resources to better use by taking expeditious action in accordance with the Court's remand instructions rather than by taking expeditious action in filing what was likely to be, and what has in fact become, a nullity.

[2]The thirtieth day after entry of this Court's order is September 7th, a Saturday.

termination on remand—we are filing this motion to alter the judgment.[3]

The proposed alteration should ensure timely, and ultimately substantive, compliance with this Court's directive. In other similar cases, the Court has directed the ITC to determine and to report to the Court before a date certain (i.e., within 30 or 45 days). *See Jeannette Sheet Glass Corp. v. United States*, 9 CIT ___, 607 F. Supp. 123 (1985); *American Lamb Co. v. United States*, 9 CIT ___, Slip Op. 85-59 (1985); *Republic Steel Corp. v. United States*, 8 CIT ___, 591 F. Supp. 640 (1984), *reh'g denied*, 9 CIT ___, Slip Op. 85-27 (1985).

Both aspects of those directives—the time limitation and the retention of jurisdiction to make certain that the agency's determination on remand is in conformity with the Court's instructions—are sound. Clearly, the ITC should not have to take more than 30 days in this case to issue a new determination, in view of the facts that (a) the ITC has no more than 45 days to reach a preliminary determination in the first instance and (b) the Court's guidance to the ITC in the premises has been explicit and crystal clear. Furthermore, the Court should retain control of the case to ensure that the ITC complies substantively with its directive. Thus far, in the only one of these cases in

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[3] To the domestic industry's detriment, the antidumping investigation has been put on hold for approximately a year because of the ITC's erroneous determination. Moreover, it may be noted that current business setbacks experienced by the domestic industry, which have been the subject of ample press coverage, have been considerable. *See, e.g., Bulging tire inventories cause layoffs, shutdowns*, Tire Business, July 8, 1985, at 1, col. 3 ("Bulging tire inventories created by ever-growing imports and declining demand are causing tire manufacturers to furlough employees, close plants temporarily and shorten workweeks."); *Tire makers' results dip in 2nd qtr.*, Tire Business, August 5, 1985, at 1, col. 3 ("Second quarter and first half results of eight U.S. tire manufacturers show clearly the downswing in tire industry sales and business as a whole for the nation's tire companies.").

which the ITC has issued a new preliminary determination after remand from the Court—*Thin Sheet Glass From Switzerland, Belgium, and The Federal Republic of Germany*, Investigations Nos. 731-TA-127 through 129 (Preliminary)(Remand), USITC Public. 1727 (July 1985), on remand from *Jeannette, supra*—a substantial issue has been raised (and is in the process of being briefed before Judge Newman) as to whether the ITC's new determination is consistent with the Court's opinion.

In view of all the foregoing, plaintiffs' motion for alteration of judgment should be granted.

Respectfully submitted,

/s/ FREDERICK L. IKENSON
FREDERICK L. IKENSON

/s/ J. ERIC NISSLEY
J. ERIC NISSLEY
Frederick L. Ikenson, P.C.
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009
Telepone: (202) 483-8900

Attorneys for Plaintiffs

[Filed and served on August 19, 1985]

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE: HON. JAMES L. WATSON, JUDGE

Court No. 84-10-01444

THE ARMSTRONG RUBBER COMPANY, ET AL.,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

ORDER

Upon consideration of plaintiffs' motion for alteration of judgment, other parties' responses thereto, and all other pleadings, papers, and proceedings had herein, it is hereby

ORDERED, ADJUDGED, AND DECREED that plaintiffs' motion is granted, and it is further hereby

ORDERED, ADJUDGED, AND DECREED that the judgment entered in this proceeding on August 8, 1985, is amended by replacing the period following the word "opinion" with a semicolon, followed by:

"and it is further

ORDERED that the International Trade Commission shall issue said determination and report it to this Court as soon as possible but in no event later than September 9, 1985."

_____
JUDGE

Dated: _____, 1985
New York, New York

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE: HON. JAMES L. WATSON, JUDGE

Court No. 84-10-01444

THE ARMSTRONG RUBBER COMPANY, ET AL.,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

ORDER

Upon consideration of plaintiffs' motion for alteration of judgment, other parties' responses thereto, and all other pleadings, papers, and proceedings had herein, it is hereby

ORDERED, ADJUDGED, AND DECREED that plaintiffs' motion is granted, and it is further hereby

ORDERED, ADJUDGED, AND DECREED that the judgment entered in this proceeding on August 8, 1985, is amended by replacing the period following the word "opinion" with a semicolon, followed by:

"and it is further

ORDERED that the International Trade Commission shall issue said determination as soon as possible but in no event later than September 9, 1985."

_____
JUDGE

Dated: _____, 1985
New York, New York

APPENDIX J

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE: HONORABLE BERNARD NEWMAN, SENIOR JUDGE

Court No. 83-5-00729

JEANNETTE SHEET GLASS CORPORATION,
Plaintiff,

v.

UNITED STATES,
Defendant,

CRYSTAL INTERNATIONAL CORPORATION, ET AL.,
Intervenors.

ORDER

Upon consideration of Defendant's motion, of Plaintiff's opposition thereto, and of all other papers filed and proceedings had herein, it is hereby

ORDERED that the administrative record to be considered by the Commission under 19 U.S.C. § 1673b(a) consists of not only the petition, but of all information gathered by the agency during the investigation period and contained in the administrative record; and it is further

ORDERED that the determination of the defendant, U.S. International Trade Commission, insofar as it purports to limit the scope of review under 19 U.S.C. § 1673b(a), is erroneous; and it is further

ORDERED that in this particular instance the application of an incorrect formulation of the appropriate legal standard did not result in a determination different from that which

would have been made under the correct legal standard; and, accordingly, it is further

ORDERED that the motion to affirm the agency remand determination be, and the same hereby is, granted.

/s/ BERNARD NEWMAN
BERNARD NEWMAN, Senior Judge

Dated: Sept. 10, 1985
New York, New York

APPENDIX K

LAW OFFICES
FREDERICK L. IKENSON, P.C.
1875 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20009

September 17, 1985

Michael Mabile, Esq.
Office of the General Counsel
United States International Trade Commission
Room 216
701 E Street, N.W.
Washington, D.C. 20436

Re: United States v. The Armstrong Rubber Company, et al., CAFC Appeal No. 85-2707

Dear Michael:

This is submitted in response to your Ms. Jacobs' letter to me of September 5, 1985, which I received on September 9, 1985, relating to the above-referenced appeal.

First, as I have advised your office previously, I do not consider the appeal to be viable, and I shall be filing a motion to dismiss it.

Second, notwithstanding the foregoing, I shall respond herein to your designation of appendix. In addition to the documents which Ms. Jacobs designated, I request that the following documents also be included in any appendix which is prepared and filed:

(a) The lower court's docket sheet;

(b) Plaintiffs' Complaint;

(c) The Commission's Answer;

(d) Exhibits 1, 2, and 3 to plaintiffs' brief in support of their motion for judgment upon the administrative record;

(e) Exhibit 4 to plaintiffs' brief in reply to the memorandum of the United States International Trade Commission in response to plaintiffs' motion for judgment upon the administrative record; and

(f) The following portions of Doc. No. 1 from List 2 (confidential version of antidumping petition and attachments): pages 109-110 and Exhibit 28.

Of course, the documents mentioned in (f) above, as well as various other documents identified in your designation, would have to be placed in a confidential segment of the Appendix (*see* CAFC Rule 12(i)).

Very truly yours,

/s/ FREDERICK L. IKENSON
FREDERICK L. IKENSON
Attorney for Plaintiffs-Appellees

FLI:kp

cc: Thomas Wilner, Esq.